Tennessee TEC Ethics Commission

Item 6a, 4.22.08 meeting book

STAFF DRAFT #3 (4.11.08)

April __, 2008

ADVISORY OPINION 08-XX

Interpretation of Tenn. Code Ann. §§ 3-6-301 (15) and (17) with regard to whether a person who receives compensation for advising clients on strategies for communicating with officials in the legislative or executive branch in order to affect legislative or administrative action is engaged in lobbying.

Requestor: Robert Gowan, Southern Strategy Group

QUESTION

Whether the Ethics Reform Act ("Act") requires a member of a lobbying firm to register as a lobbyist if the member gives advice to clients, for compensation, on strategies to influence legislative or administrative action, and if such advice includes identification of which legislative or executive officials the client should contact, how the client should communicate with them, when the client should communicate with them, and what the content of the communication should be?

ANSWER

Yes. While the answer will depend on the particular facts assumed in each case, in general a member of a lobbying firm who advises clients, for compensation, on which officials to contact, how to contact the officials, when to contact the officials, and what to tell the officials, for the purpose of influencing legislative or administrative action, is engaged in "lobbying" as defined under the Act and therefore must register as a lobbyist.

ASSUMED FACTS

According to the original request and a subsequent clarification, Mr. Gowan is engaged in advising clients or lobbyists "on a strategy to influence legislative or administrative action." [1]

[1] For the purposes of issuing this advisory opinion, the Commission assumes, without deciding, the truth of facts presented in the request. A meaningful advisory opinion cannot be issued without assuming some set of facts to which the provisions of the Act may be applied. The statute authorizing the Commission to issue advisory opinions provides, in pertinent part, that "[w]ith respect to an issue addressed in an advisory opinion, any person who conforms that person's behavior to the requirements of the advisory opinion may rely upon the advisory opinion without threat of sanction." Tenn. Code Ann. § 3-6-107(3). If no facts are assumed, the Commission cannot inform the requestor how to conform his or her conduct to the requirements of the opinion. To the extent any of the

In doing so, Mr. Gowan identifies legislative or executive officials with whom the client might wish to communicate for the purpose of influencing legislative or administrative action. He also suggests "the means and timing of the communication," and gives "general" advice about the content of the communication. He stresses that it is always up to the client or lobbyist whether to follow any of his advice.

The Commission further assumes that Mr. Gowan, whose request was submitted on the letterhead of a lobbying firm, Southern Strategy Group, is compensated for giving this advice. The Commission notes that a media release by Southern Strategy in December 2007 identified Mr. Gowan as one of the persons who "will be lobbyists in the new Nashville office" of the Group.[2] The Group's lobbyists "are drawn from the top ranks of government and the political process" and "[t]hey also bring with them close relationships to powerful public officials fostered over many years."[3]

ANALYSIS

The Act requires a person engaged in lobbying for compensation to register as a lobbyist.[4] The Act defines a lobbyist as "any person who engages in lobbying for compensation."[5] The Act defines "lobby" as "to communicate, *directly or indirectly*, with any official in the legislative branch or executive branch for the purpose of influencing legislative or administrative action."[6] As previously noted by the Attorney General and Reporter, the question "whether any particular individual falls within the definition of the term lobbyist or qualifies for an exemption from registration will depend on particular facts and circumstances."[7] Assuming Mr. Gowan is compensated for the advice he gives, and assuming that the advice is for the purpose of influencing legislative or administrative action, the question then becomes whether, under the particular facts and circumstances assumed in this opinion, Mr. Gowan's activities amount to direct or indirect communication with any official.

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assumed facts turn out to be untrue, or a person does not in fact conform his or her conduct to the facts assumed, then the advisory opinion may provide no protection from the imposition of sanctions.

[2] www.sostrategy.com (visited March 19, 2008). The site also states that the Group is "the South's largest lobbying firm," employing thirty-eight (38) lobbyists in fifteen (15) offices throughout the United States. Mr. Gowan is quoted on the website as saying that the Group uses "a new approach to lobbying where clients receive multi-state services without losing the hometown touch." For purposes of issuing this opinion, the Commission assumes the truth of these and other statements attributed to Mr. Gowan or Southern Strategy in widely available public sources such as the Internet.

[3]. Other than this limited examination of publicly available statements, this opinion is based on assumed facts concerning future behavior rather than matters of historical fact. Determination of specific historical facts would require investigation, which is beyond the scope of the Commission's duties in rendering advisory opinions.

[4] Tenn. Code Ann. § 3-6-302(b)(2). *See also* Advisory Opinion 06-01 (lobbyists have seven (7) days to register).

[5] Tenn. Code Ann. § 3-6-301 (17).

[6] Tenn. Code Ann. § 3-6-301(15)(emphasis added).

[7] Op. Tenn. Atty. Gen., No. 96-024 (Feb. 22, 1996).

The Act does not define "communicate," "directly," or "indirectly." Since interpretation of statutes in Tennessee must start with the plain and ordinary meaning of the words used, [8] the Commission first looks to the dictionary definitions of these words. The dictionary meanings of "communicate" include: "to make known," and "to manifest: disclose." On the other hand, "communicate" is also defined as "to have an interchange, as of ideas or information," or "to express oneself effectively." [9] There is more than one plain and ordinary meaning of the word "communicate" that may apply here, and these meanings are different. One meaning requires only that information be disclosed from one to another. The other meaning requires that there be mutual disclosure, or "interchange."

Since "communicate" is modified by the adverbs "directly" and "indirectly," it is appropriate to inquire whether these modifiers can resolve the ambiguity. "Directly" is defined as "in a direct line or way: straight," or "without intervention: immediately."[10] Indirectly, which is the adverb form of "indirect," is defined as "not proceeding or lying in a straight course or line."[11] Thus "directly" and "indirectly" complement each other. In effect they cover the universe of whatever is meant by "to communicate." One must communicate either in a straight line or not in a straight line. Thus the modification of "communicate" by these words does not clear up the ambiguity.

In light of the ambiguity in the meaning of the word "communicate," it is appropriate to turn to words used in related statutes,[12] the overall legislative purpose,[13] legislative history,[14] and previous administrative interpretations of the Act. The related provisions of the act, and the

[8] *Sallee v. Barrett,* 171 S.W.3d 822 (Tenn.2005)(discussing giving effect to legislative intent without unduly restricting or expanding legislation); *State v. Blackstock,* 19 S.W.3d 200, 210 (Tenn. 2000)("legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language.")

[9] *Webster's II New College Dictionary*, 233 (3rd ed. 2005).

[10] *Webster's II New College Dictionary*, 328 (3rd ed. 2005).

[11] *Webster's II New College Dictionary*, 578 (3rd ed. 2005). The Court of Appeals relied on the following dictionary definition in construing a statute prohibiting direct or indirect interests: "not direct: ... (1): deviating from a direct line or course: not proceeding straight from one point to another: proceeding obliquely or circuitously: roundabout." *State v. Whitehead*, 43 S.W.3d 921, 929 (Tenn. Crim. App. 2000) (dicta—statute held unconstitutional under equal protection clause).

[12] Statutes "relating to the same subject or having a common purpose" should be construed together, and the construction of one may be used to help resolve ambiguity in another. *Lyons v. Rasar,* 872 S.W.2d 895, 897 (Tenn. 1994).

[13] "In ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment." *State v. Edmondson*, 231 S.W.3d 925 (Tenn. 2007), quoting *State v. Collins,* 166 S.W.3d 721, 726 (Tenn.2005) (internal quotation marks and citation omitted).

[14] *State v. Edmondson,* 231 S.W.3d 925, 927-28 and nn. 5, 6 (Tenn. 2007) ("possession" not defined in carjacking statute, and dictionary definition did not resolve issue; court considered terminology used in related robbery statute, as well as statements in legislative debates to the effect that legislators wanted the state carjacking law to differ from the federal law, and that all carjackings should be prosecutable as B felonies, regardless of whether a deadly weapon was used).

statement of legislative intent to increase transparency,[15] show an intent to foster increased disclosure of lobbying activities. To construe "communicate" as requiring that there be an "interchange" of ideas would greatly narrow the scope of the statute. Such a construction would lead to the absurd result that presenting facts, opinions, and other information to an official, for compensation, with the purpose of influencing official action, would not be subject to regulation so long as the official did not respond to the presentation with facts, opinions, or other information of his or her own. Statutes should be construed "with the saving grace of common sense" and to avoid an absurd result.[16] Furthermore, as previously noted by the Commission, the Act's definition of "lobby" is "broad." [17] Since "communicate" is part of the definition of lobby, it would not make sense to construe "communicate" in such a narrow fashion. On the other hand, it is not absurd to construe "communicate" to require only a making known or manifesting of information to the official, regardless of whether the official responds.

This construction of the phrase "to communicate, directly or indirectly" is also supported by legislative history and a comparison with the lobbying statutes and judicial decisions of other jurisdictions. Tennessee has regulated lobbying at least since 1897. The first definition required "personal solicitation of any member of the General Assembly."[18] Civil regulation of lobbying was adopted in 1965, [19] but the personal solicitation requirement was not incorporated until 1975. At the same time the requirement of "communicating" was introduced. ""Lobbying' and 'to lobby' means [sic] communicating directly or soliciting others to communicate with any official in the Legislative or Executive Branch with the purpose of influencing any legislative or

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[15] The statement of intent found in the Act provides:

> It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee Ethics Commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

Tenn. Code Ann. § 3-6-102.

[16] *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)(citations omitted).

[17] Advisory Opinion 06-03, at 11 (Dec. 12, 2006).

[18] In that year, the General Assembly defined lobbying as:

> any personal solicitation of any member of the General Assembly of this State, during a session thereof, by private interview, letter, message, or other means or appliance, not addressed solely to the judgment, to favor or oppose, or to vote for or against, any bill, resolution report, or claims, for the purpose of procuring the passage or defeat thereof; *Provided,* however, that the foregoing definition does not include the presentation of petitions or memorials, or any address made before a committee of either House, or joint committee of both Houses, of the General Assembly

Lobbying, so defined, was made a felony. 1897 Tenn. Pub. Acts, ch. 117 (emphasis in original).

[19]Lobbying was defined as "[t]he practice of promoting or opposing, influencing or attempting to influence directly or indirectly, the passage or defeat of any legislation before the General Assembly, the legislative committees, or the members thereof." 1965 Tenn. Pub. Acts, ch. 187, § 1, paragraph 2.

administrative action."[20] In 1976, the legislature amended the 1975 act's definition of "lobbyist" to explicitly restrict the reach of the statute to persons who "[m]ake[] *direct personal contact* with an official . . . ."[21]

In 1990, the legislature dropped the "direct personal contact" requirement of the "lobbyist" definition and instead simply defined a lobbyist, for the first time, as "any person who engages in lobbying."[22] At the same time, the legislature removed the solicitation element from the definition of "lobby," and added the word "indirectly" as a modifier of the verb "communicate." The resulting definition of lobby was: "'Lobby' means to communicate, directly or indirectly, with any official in the legislative branch or executive branch, for pay or for any consideration, for the purpose of influencing any legislative action or administrative action."[23] The definition of "lobbyist," and the relevant part of the definition of "lobby," were carried over to the 2006 Act under consideration here.[24]

It is well-established that the "[l]egislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation,"[25] and that "a change in the language of the statute indicates that a departure from the old language was intended."[26] Similarly, it is hornbook law that the "legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose."[27] Thus in dropping the "directly" requirement from the definition of "lobbyist," and in adding the word "indirectly" to the definition of "lobby," the legislature must be presumed to have intended a change in the scope of the previous law. If the legislature had intended in 2006 to restore the "direct personal contact" provision from the 1976 law, it could have done so. Since it did not, the only reasonable conclusion is that the legislature intended to expand the scope of activities subject to the registration requirement.

This conclusion is supported by comparison with the laws of other jurisdictions. Statutes in at least seven other jurisdictions specifically provide that registration is required only when

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[20] Tennessee Lobbyist Registration and Disclosure Act, 1975 Tenn. Pub. Acts, ch. 313. § 2(k), codified as former Tenn. Code Ann. §3-602(k)(1975 Supp.)

[21] 1976 Tenn. Pub. Acts, ch. 770, § 1(c)(emphasis added), amending former Tenn. Code Ann. § 3-602(l) (1975).

[22] 1990 Tenn. Pub. Acts, ch. 1049, §7, amending former Tenn. Code Ann. § 3-6-102(13) (1989).

[23] 1990 Tenn. Pub. Acts, ch. 1049, amending former Tenn. Code Ann. § 3-6-102 (12) (1989).

[24] The phrase "for pay or for any consideration" as used in the 1990 definition of "lobby" was replaced in 2006 by the word "compensation," but that does not affect the analysis here.

[25] *Lavin v. Jordon*, 16 S.W.3d 362, 368 (Tenn. 2000)(noting that the legislature appeared to have adopted language directly from a Supreme Court opinion construing a previous version of the statute).

[26] Lavin, 16 S.W.3d at 369.

[27] *Bryant v. Genco Stamping & Mfg. Co.,* 33 S.W.3d 761, 765 (Tenn.2000), cited in *State v. Hawk*, 170 S.W.3d 547 (Tenn. 2005)..

there is "direct communication." [28] Other jurisdictions regulate direct communication and solicitation of others to communicate.[29] If the legislature had intended a narrow construction of "communicate" it presumably was aware of the restrictive language used in the statutes of other states.[30]

When the term "communicate" is interpreted to mean "to make known," or "to manifest: disclose," it becomes clear that Mr. Gowan's assumed activities constitute lobbying. He is paid to help clients influence legislative or administrative action. He provides this help by advising his clients on which officials to contact, how and when to contact them, and what to say to them. When clients convey to state officials information that has been provided by Mr. Gowan, and do so in a manner consistent with his advice, Mr. Gowan is communicating, either directly or indirectly, with the officials.

In connection with his request, Mr. Gowan points out that the Commission has previously opined that "a person who has been employed to monitor legislation, without engaging in traditional lobbying activities, . . . is not a lobbyist for the purposes of the Act and is not required to register."[31] In reaching this conclusion, the Commission stated that "monitoring may also include drafting, advising clients, or rendering opinions on proposed legislation, rules, regulations, municipal ordinances and resolutions."[32] Mr. Gowan appears to be arguing that under the rationale of opinion 06-03 his assumed conduct would not constitute lobbying.

The Commission agrees that it is important to consider its previous opinions when they are on point. It is well settled that a statutory construction "long accepted by an executive department of the State will usually be accepted by the courts unless the administrative construction is a palpably wrong construction of an unambiguous statute."[33] Even if a

[28] Alaska: "communicate directly" _____; Arizona: "directly communicating"____; Delaware _____, District of Columbia_____, Michigan: "communicating directly" ___;Indiana: "acting directly"_____. The Alaska statute goes further and specifically defines "communicate directly" as ""to speak with a legislator, legislative employee, or public official; (A) by telephone; (B) by two-way electronic communication; or (C) in person." Alaska Statutes Annotated § 24.45.171.

[29] Arkansas "communicating directly or soliciting others to communicate"_____; Colorado "communicating directly, or soliciting others to communicate"_____; Connecticut: "communicating directly or soliciting others to communicate"_____; Hawaii: "communicating directly or through an agent, or soliciting others to communicate"____; Maryland _____; Minnesota: "by communicating or urging others to communicate with" _____.

[30] Some courts have held that when construing statutes, the legislature must be presumed to be aware of the law of other jurisdictions that have legislated on the same subject. See, e.g., *Cowhick v. Shingle***,** 5 Wyo. 87, 37 P. 689, 692 (1894); *Beeson v. Green Mountain Gold Min. Co.* 57 Cal. 20, 25-26 (1880); distinguished on other grounds by _____.

[31] Advisory Opinion 06-03 (Dec. 12, 2006), at 1.

[32] Id., at 2.

[33] *Williams v. Massachusetts Mutual Life Insurance Co.,* 221 Tenn. 508, 514, 427 S.W.2d 845 (1967). *See also National Council on Compensation Insurance v. Gaddis*, 786 S.W.2d 240, 242 (Tenn. Ct. App. 1989), p.t.a. denied (Tenn. 1990) ("Where a statute is subject to construction, we accord persuasive weight to administrative interpretations.")

construction is not "long accepted," it may still be entitled to considerable deference by the courts.

With regard to opinion 06-03, however, it is important to note that the opinion emphasized that "monitoring is passive." Furthermore, "any action taken to purposely influence or have an effect on the subject does not fit within the definition of monitoring."[34] Mr. Gowan's request assumes that his activities are "taken purposely to influence or have an effect on" legislative or administrative action. Thus the conclusion in 06-03 is not applicable to the facts assumed in the present request.

Not only is the purpose of Mr. Gowan's activities different from purpose described in opinion 06-03, but the activities themselves also are different. As pointed out in that opinion, "monitor" in its ordinary and natural meaning is defined as "to observe, record or detect (an operation or condition) with instruments that have no effect upon the operation or condition," or "to keep track of systematically with a view to collecting information." Although such recording and detecting would logically be part of the activities described in Mr. Gowan's request, it is obvious that he undertakes other activities which go well beyond monitoring.

Mr. Gowan also stresses that he does not "direct" his clients to do anything but merely "suggests," and that his clients may decline to take his suggestions or advice. By these statements, he may be suggesting that he cannot be considered to be engaged in "lobbying" because it cannot be assumed that the information he gives his clients is ever communicated to an official.[35]

Such a construction would be inconsistent with the purposes of the Act, impractical to administer, and inconsistent with a previous opinion issued by the Commission. In Advisory Opinion 06-01, the Commission dealt with a closely related issue. The requestor suggested that since a lobbyist by definition is one engaged in lobbying, a lobbyist need not register until seven (7) days after "that moment when one engages in actual lobbying . . . ."[36] Thus registration could take place "days or even months after entering into a lobbying agreement or arrangement with an employer." The Commission disagreed:

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[34] Id.

[35] It is difficult for the Commission to precisely identify Mr. Gowan's argument because of the paucity of materials provided with the request. The original request asked for an opinion on whether the following activity falls within the statutory definition of lobbying: "Advising a client or lobbyist on a strategy to influence legislative or administrative action." No further description of Mr. Gowan's activities was provided. The request stated that its purpose was "to clarify what it means to communicate 'indirectly' as used in th[e] statute." (Letter, Jan. 28, 2008) Commission staff asked Mr. Gowan to supply facts to permit the Commission to give a meaningful opinion. In his e-mailed response, Mr. Gowan stressed the excerpt from Opinion 06-03 discussed above. He also stated that he suggested who to contact, how to contact them, when to contact them, and gave "general" advice regarding the content of the communication.

[36] Advisory Opinion 06-01 (Dec. 12, 2006), at 2. Since "to lobby" means "to communicate, directly or indirectly, with any official in the legislative or executive branch for the purpose of influencing . . ," the requestor "argue[d] that one cannot be a lobbyist until that moment when one engages in actual lobbying which, [sic] could occur days or even months after entering into a lobbying agreement or arrangement with an employer."

> The term "lobbyist" is a noun and is used to define a member of a profession – one "who engages in lobbying for compensation." Just as an attorney is one who practices law, a realtor is one who is licensed to represent buyers and sellers of property, a cosmetologist is one who provides beauty treatments, and a truck driver is one who drives a large commercial vehicle, a person is a "lobbyist" by occupation whether or not he or she is "lobbying" at the exact moment.[37]

This reasoning applies to the facts presented here. Just as a doctor or a lawyer is considered to be engaging in his or her profession even as to clients who fail to follow the advice given, a professional lobbyist must be considered to be engaging in that profession despite the failure of some clients to take his or her advice. A physician does not cease to be a physician if his patient declines advice to quit smoking. An attorney does not cease to be an attorney if her client refuses advice to close his illegal business.[38] Likewise, a professional lobbyist does not cease to be a lobbyist simply because his client declines to meet with a certain legislator or follow the means, timing, and method suggested.

In opinion 06-01 the Commission used the establishment of an employment relationship to provide "a simple, bright-line approach in determining when the registration requirement commences."[39] The commission rejected the suggestion that registration should be triggered only when a person actually engages in communicating with officials because it "would provide vague guidance and lead to ambiguities as to when a lobbyist should register." The Commission gave the following example:

> For example, if a lobbyist places an informational piece about a particular issue in a trade journal, which may be read by legislative or executive branch officials, is that a direct or indirect communication for the purpose of influencing legislative or administrative action which would trigger the seven-day registration requirement? Are "lobbying" and the requirement that the communication have as its purpose "to influence," going to be defined by the provider of the communication or the recipient?

Similarly, if a person gives advice under the circumstances described in Mr. Gowan's request, is "lobbying" going to be defined by "provider of the communication or the recipient?" A bright line rule focused on the nature of the activity engaged in by the provider, and the natural and probable consequences of this activity, avoids such ambiguity.

In 06-01, the Commission also pointed that an "actual lobbying" approach to registration would be inconsistent with the purposes of the Act:

> If, as Mr. Lodge [the requestor] argues, one does not become a lobbyist until seven days after one engages in actual lobbying, then there is a window of time within which a

[37] Advisory Opinion 06-01 (Dec. 12, 2006), at 3.

[38] *See United States v. Bloom*, 149 F.3d 649, 658 (7th Cir. 1998)("If we can say, as a court, that a lawyer in the giving of advice for a fee, to a client as to how to complete an illegal transaction does not involve the lawyer bearing an interest, direct or indirect, in the transaction itself then we have provided a defense to chicanery and illegality.").

[39] 06-01, at 3.

> lobbyist has been retained by an employer (and may already be receiving compensation for lobbying services), but has not publicly disclosed any information about his or her relationships with legislative or executive officials and is not prohibited from providing gifts to candidates, legislators or executive officials. The Commission believes that the Legislature did not intend to defeat the purpose of the statute by creating such a loophole.

Similarly in the present assumed scenario, if one does not become a lobbyist until after there has been actual communication of information to a state official, then this creates a window of time within which a person engaged in the business of lobbying does not have to disclose his or her relationships with state officials and is not prohibited from making gifts to such officials. This approach would defeat the purpose of the Act, and the Commission declines to follow it.

Mr. Gowan may be asserting that as long as he takes care not to learn whether his clients have communicated his information to the officials, he cannot be considered to be lobbying. It would be absurd to interpret the Act to require registration only if the client follows the advice to engage in the communication in the manner advised, and the lobbyist knows it. A construction which would lead to an absurd result is to be avoided.[40]

It is not necessary for the purposes of this opinion to determine whether Mr. Gowan would still be considered to be communicating with the officials if the information he provided had to travel through one or more additional intermediaries before reaching the officials.[41] The Commission has not been asked to make any such assumption. Suffice it to say that whatever the limits on the breadth of the term "communicate" may be, they are not reached under the facts assumed here. [42]

Finally, it is significant that under the assumed facts Mr. Gowan holds himself out publicly as a lobbyist. The request was submitted under the letterhead of a lobbying firm.

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[40] *Wachovia Bank of N.C v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000)(courts should presume the legislature did not intend an absurd result).

[41] At a certain point, as the number of intermediaries increases, and the link between the adviser's information and the target official becomes more attenuated, it will be irrational to apply a literal interpretation of the word "communicate." See appendix 1.

[42] A literal construction of the term could lead to constitutional issues of overbreadth and vagueness. Some courts have dealt with these issues by construing lobbying statutes to reach only "direct," communication. For example, in *United States v. Harriss,* the court avoided these constitutional issues by narrowly construing the Federal Regulation of Lobbying Act to apply only to attempts to "directly" "influence the passage or defeat of any legislation." The statute on its face covered attempts "to influence, directly or indirectly, the passage or defeat" of legislation. 347 U.S. 612, 620-621 and n.10, 74 S.Ct. 808, 813-814 (1954). However, in reaching this result the court also opined that "direct" influence could include "artificially stimulated letter campaigns." 347 U.S. at 620, 74 S.Ct. at 813. *Cf. Young Americans for Freedom, Inc v. Gorton*, 522 P.2d 189, 190-192 (Wash. 1974)(upholding regulation of letter campaigns as indirect lobbying); *Minn. State Ethical Practices _____ v. Nat'l Rifle Ass'n*, 761 F.2d 509, 510 (8th Cir. 1985)(upholding constitutionality of requirement that NRA executive director register as lobbyist for sending letters and mailers urging NRA members to contact their legislators in support of pending legislation); *Comm'n on Indep. Coll. and Univ. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp 489, 497 (N.D.N.Y 1982)(finding a lobbying disclosure statute was not overbroad even though it did reach indirect as well as direct lobbying activities); *Kimbell v. Hooper,* 665 A.2d 44, 47 (Vt. 1995)(finding state statute requiring disclosure of indirect lobbying activities not overbroad).

The public pronouncements of the firm and of Mr. Gowan do not reflect any limitation of Mr. Gowan's lobbying activities as to officials of state government.[43] In passing the Act, the legislature was obviously concerned not only with the prevention of unregulated and undisclosed lobbying practices but with eliminating or reducing the perception of such activities. The Act expressly says its purpose is "to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct." Sustaining "the public's confidence" requires attention to the public's perception. It is thus consistent with the purpose of the Act to give substantial weight to the perception created by the public pronouncements of Mr. Gowan and Southern Strategy Group.

CONCLUSION

For the reasons stated above, the Commission concludes that, based on the particular facts assumed for purposes of this opinion, Mr. Gowan must register as a lobbyist. The Act, in general, requires a member of a lobbying firm to register as a lobbyist if the member gives advice to clients, for compensation, on strategies to influence legislative or administrative action when such advice includes identification of which legislative or executive officials the client should contact, how and when the client should communicate with such officials, what the client should tell or present to such officials. The determination of whether any individual is engaged in lobbying will depend on the particular facts of each case.

Donald J. Hall, Chair
R. Larry Brown
Thomas J. Garland
Linda Whitlow Knight, Esq.
Dianne Ferrell Neal
Benjamin S. Purser, Jr.,
Commissioners

Adopted: April 22, 2008

[43] The Act only regulates lobbying of officials of the state of Tennessee. It does not apply to lobbying of local and county governments, the federal government, or the governments of other states. Mr. Gowan's biography appears at Southern Strategies' biography page, http://www.sostrategy.com/lobbyists.php#14. (visited March 19, 2008). The Act does not prohibit lobbying firms or lobbyists from making disclaimers about limitations on their practices. Such disclaimers are routine for attorneys who have an office in a state in which they are not licensed to practice law.

Appendix 1

Opinion 06-02

The conclusion that Mr. Gowan, under the assumed facts, is engaged in lobbying is not inconsistent with other previous opinions of the Commission. In opinion 06-02, the Commission stated that an attorney is not required to register as a lobbyist if her or she provides "general strategic advice" to a client, provided that "[t]hese communications are strictly between the attorney and the client, and do not involve communications with anyone in the legislative or executive branch of state government." [44] Obviously Mr. Gowan's request assumes that there will be at least some communications with legislative or executive officials.

Opinion 07-10

In opinion 07-10, the Commission opined that members of a public relations firm are not required to register as lobbyists simply by virtue of arranging meetings between the firm's clients and state officials so that the officials will be familiar with the clients in the event that a future business opportunity might arise. The Commission construed the terms "influence administrative action" in a commonsense rather than overly literal manner to avoid an absurd result:

> It appears that the introductory meetings arranged by McNeely between its client and agencies with which the client currently conducts no business are analogous to the general marketing engaged in by virtually all businesses, and thus, if the meeting is only to provide client background information, it would appear that the communications are not to influence an administrative action and McNeely need not register as a lobbyist. A contrary result would require that any entity that uses a public relations firm to assist it with providing generalized information to the state of Tennessee, either in person or through written materials, would be required to register as an employer of a lobbyist, and the public relations representative would be required to register as a lobbyist.

The Commission placed an important caveat on this conclusion:

> However, there is an important caveat. Neither McNeely nor the client can recommend to the agency that they procure a service or good, terminate an existing business relationship, postpone a decision, or communicate on any other matter that could "influence an administrative action". Thus, it is not the introductory meeting in and of itself that may give rise to a need to register as a lobbyist; rather, it is the substance of the communications made at such time.

The substance of the communications as to which Mr. Gowan advises his clients goes well beyond the content of simple introductory meetings. Mr. Gowan and Southern Strategy are not paid to arrange an introduction but to give advice that will help the client influence official legislative or administrative action.

[44] Id., at 7.

The limits to the meaning of "communicate."

The issue of how far back to extend the causal chain from the point where the information reaches the official is akin to the classic legal problem of identifying, in the case of a personal injury, how far the duty of reasonable care, or foreseeability, may be extended to provide a legal basis for recovery. In *Palsgraf v. Long Island R. Co*.,248 N.Y. 339, 162 N.E. 99 (1928), Justice Cardozo summarized the facts as follows:

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

248 N.W. at 340-41. In deciding whether the railroad company had breached any legal duty to the plaintiff, the Court emphasized that "there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station." 248 N.W. at 345. Consequently, even though there was cause in fact, there was as a matter of law no "negligence" or right to recover.